No. 584

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

HONORABLE MICHAEL J. ROCHE, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, AND THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, PETITIONERS,

vs.

CORPORATED MILK ASSOCIATION, ET AL.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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STATEMENT OF THE CASE.

On June 3, 1941, an indictment was filed in the Uni States District Court charging some forty-four defe ants connected with the evaporated milk industry v violation of the Sherman Act (R. 12). These defenda are respondents on this petition for certiorari.

The case arises as follows:

The grand jury which returned the indictment was

It returned the indictment at the end of the March 1941 term (R. 3). The grand jury had no jurisdiction to return the indictment in the March term except as authorized by section 284 of the Judicial Code (28 U.S.C. 421):

> "A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request was made, **solely to finish investigations begun but not finished by such grand jury,** * * *."

Pursuant to this statute and on representations of government counsel that unfinished matters were before the grand jury, the District Court on February 28, 1941, made an order continuing the life of the grand jury into the March term for the *sole purpose* of finishing such investigations (R. 48).

The indictment, when returned, alleged that the "investigation of the matters charged in this indictment" had been "begun but not finished during said November Term of said Court" (R. 12).

The defendants filed pleas alleging that the investigation had *not* been begun at the November 1940 term (R. 34, 46). The Government always refers to these pleas as "pleas in abatement"; in fact the pleas are founded on the statute quoted above and go to the jurisdiction; they aver expressly that the grand jury had no jurisdiction to return the indictment and that the court has no jurisdiction to try the case (R. 41, 46).[1]

The Government filed replications traversing the pleas, which, of course, raised an issue of fact as to whether

[1] See *Ex parte Bain* (1887) 121 U.S. 1, 13-14, and cases in footnote 3, infra.

the investigations had or had not been commenced in the November term.

The court set the matter down for jury trial for December 3, 1941, government counsel conceding in response to a question by the court that defendants were entitled to a jury (R. 8). The trial was later continued to December 15 at the Government's request (R. 9). On December 9, however, the Government moved for leave to withdraw its replications and to make motions to strike the pleas (R. 52). The trial court granted leave as prayed and sustained the motions to strike (R. 69).

The Circuit Court of Appeals issued an alternative writ of mandate to show cause why the pleas and replications should not be reinstated and a trial had thereon (R. 55). After hearing, the court issued a peremptory writ (R. 124). Upon rehearing, before the court in banc, the court by a four to two vote adhered to its ruling (R. 130, 135, 147).

The Government then filed this petition for certiorari, the writ of mandate being stayed meanwhile (R. 149, 150).

ARGUMENT.

Petitioners make no point on this petition of the alleged formal insufficiency of the pleas (Petition, p. 2, note), which obviously presents no question of public concern.

In referring to the "Statute involved," petitioners cite only section 262 of the Judicial Code (28 U.S.C. 377), which is the general statute permitting the Federal Courts to issue writs necessary for the exercise of their

respective jurisdictions. No reference is made to section 284 of the Judicial Code, quoted above, under which the pleas attack the jurisdiction of the grand jury and of the trial court. Neither is any reference made to the constitutional and statutory provisions safeguarding the right of respondents to a trial by jury on the issues raised by the pleas and the Government's traverse of them.

On the above basis, petitioners frame an issue foreign to the real issue. They say the question is whether a writ of mandamus may issue to correct an erroneous ruling of a District Court on the sufficiency of a plea in abatement (Petition, p. 2).

This is not the question at all. The question is whether the Circuit Court of Appeals had *jurisdiction*—power—to issue this writ of mandamus in the particular circumstances of the present case. Petitioners do not contend that the circumstances are not such as properly to have moved the court *in its discretion* to have issued the writ if power to issue it exists. The sole question presented by the petition is, therefore, whether in *any* circumstances the Circuit Court of Appeals has power to issue a writ of mandamus in respect of *any* ruling by a District Court which might ultimately be reviewed on appeal.

The position taken by petitioners has been rejected repeatedly by this Court. The Circuit Court of Appeals has express statutory authority, like that of this Court, to issue writs of mandamus under proper circumstances (Judicial Code, section 262; 28 U.S.C. 377).[2] Among the

[2] "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

circumstances which have been held sufficient to justify the exercise of the power to issue a writ of mandamus are the following—*all* of which are present in this case:

(a) That the action of the trial court has denied petitioners the right to trial by jury.

Ex parte Simons (1918) 247 U. S. 231;

Ex Parte Peterson (1920) 253 U.S. 300;

Ex parte Skinner & Eddy Corp. (1924) 265 U.S. 86.

(b) That the matters presented involve the jurisdiction of the trial court.

Virginia v. Rives (1879) 100 U.S. 313, 323;

Ex parte Bransford (1940) 310 U.S. 354, 355;

Ex parte Northern Pac. R. Co. (1929) 280 U.S. 142;

Stratton v. St. Louis S.W. Ry. (1930) 282 U.S. 10, 16.[3]

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[3]That the present pleas go to the jurisdiction is, we submit, clear beyond argument. The pleas show that by express statute, namely, section 284 of the Judicial Code, quoted above, the grand jury had no jurisdiction to return an indictment at the March term, and that the court had no jurisdiction to try defendants under such an indictment (R. 41, 46).

In *Ex parte Bain* (1887) 121 U.S. 1, the petitioner sued out a writ of habeas corpus, alleging that he had been tried on an indictment amended on motion of the Government after its return by the grand jury. This Court held that since the indictment was "no indictment of a grand jury" the court had no jurisdiction to try or convict the petitioner, saying (121 U.S. 13-14):

> "It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, **the jurisdiction of the offence is gone,** and the court has no right to proceed any further in the progress of the case for want of an indictment."

Directly in accord is *Albrecht v. United States* (1927) 273 U.S. 1, 8, where this Court, citing *Ex parte Bain*, held that

> "A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court,"

and that a court "may acquire jurisdiction over the person of the defendant" only "when there was an appropriate accusation either by indictment or information, • • •."

(c) That no appeal lies from the challenged order and if the parties are remitted to relief on appeal from a final judgment they and the courts will be subjected to the burden of a long and expensive trial which ultimately must be held to have been required under a mistake.

Ex parte Simons (1918) 247 U.S. 231;
Ex parte Peterson (1920) 253 U.S. 300;
Ex parte Skinner & Eddy Corp. (1924) 265 U.S. 86.

In *Ex parte Simons* (1918) 247 U.S. 231, supra, the trial court had erroneously transferred a cause to the equity side of the docket. Plaintiff applied to this Court for a writ of mandamus to compel the trial judge to vacate his order and to grant a jury trial. In opposing this petition respondent presented the identical argument here advanced by petitioners[1] (247 U.S. 236):

"So far as petitioner's right at law is concerned, her constitutional right to trial by jury is no more and no less involved than is the right of any other plaintiff to whose declaration at law a general demurrer has been sustained. If the demurrer was improperly sustained, the petitioner will, after reversal and remandment, obtain her jury trial."

This Court, however, directed the issuance of the writ, saying (247 U.S. 239):

"If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance

[1] "But the order sustaining the motion to strike, like an order sustaining a demurrer, was not a refusal to try, but a final adjudication, after argument, that the pleading was insufficient in law" (Petition, p. 7).

that ultimately must be held to have been required under a mistake."

In *Ex parte Peterson* (1920) 253 U.S. 300, the trial court appointed an auditor in an action at law. Application for a writ of mandamus was made to this Court, petitioner contending that the order appointing the auditor would result in a violation of his constitutional right to a jury trial. Overruling objections to its jurisdiction to issue the writ, this Court said (253 U.S. 305-306):

> "Objection is made by respondent to the jurisdiction of this court. It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in *Ex parte Simons*, 247 U.S. 231, 239, 'be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by' a proceeding 'that ultimately must be held to have been required under a mistake.' The objection to our jurisdiction is unfounded. We proceed, therefore, to the consideration of the merits of the petition."

In *Ex parte Skinner & Eddy Corp.* (1924) 265 U.S. 86, this Court, in issuing a writ of mandamus to the Court of Claims to compel that Court to permit plaintiff to dismiss the suit, said (265 U.S. pp. 95-96):

> "It only remains to inquire whether this is a proper case for the writ asked. Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. Although classed as a legal remedy, in issuing it a court must be largely controlled by equitable principles. *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 312; *Arant v. Lane*, 249 U.S. 367, 371. It would be a useless waste of time and effort to enforce a trial in the Court of Claims if we were, upon appeal, to find that the petitioner was unjustly deprived of his substantial right to dismiss his petition, as we should have to do for the reasons stated. Added to this is the consideration which has been regarded as furnishing a substantial ground for the extraordinary process of the writ that the petitioner by a denial of his right to dismiss in the Court of Claims will be deprived of a right of trial by jury in the state court of Washington. *Ex parte Peterson*, 253 U.S. 300, 305; *Ex parte Simons*, 247 U.S. 231, 239."

Since the filing of the petition herein, this Court decided the case of *Adams v. United States, ex rel. McCann* (No. 79, this term, decided December 21, 1942). It repudiates the position taken by petitioners, who refer to the argument in the Government's brief in that case as supporting their position here (Petition, p. 9). The *Adams* case involved the jurisdiction of the Circuit Court of Appeals to issue a writ of habeas corpus on behalf of a defendant who had waived a jury without advice of counsel. While upholding the defendant's waiver, this Court held that the Circuit Court of Appeals acted within its jurisdiction in issuing the writ. Reaffirming the principles laid down in the decisions cited above, this Court said:

"Procedural instruments are means for achieving the rational ends of law. A circuit court of appeals is not limited to issuing a writ of *habeas corpus* only when it finds that it is 'necessary' in the sense that the court could not otherwise physically discharge its appellate duties. Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, **when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.** Undoubtedly therefore, the Circuit Court of Appeals had 'jurisdiction', in the sense that it had the power, to issue the writ as an incident to the appeal then pending before it. The real question is whether the Circuit Court of Appeals abused its power in exercising that jurisdiction in the situation that confronted it.

Of course the writ of *habeas corpus* should not do service for an appeal. *Glasgow v. Moyer*, 225 U.S. 420, 428; *Matter of Gregory*, 219 U.S. 210, 213. This rule must be strictly observed if orderly appellate procedure is to be maintained. Mere convenience cannot justify use of the writ as a substitute for an appeal. But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts. In exceptional cases where, because of special circumstances, its use as an aid to an appeal over which the court has jurisdiction may fairly be said to be reasonably necessary in the interest of justice, the writ of *habeas corpus* is available to a circuit court of appeals."

The *Adams* case, and the other decisions by this Court above referred to, leave no foundation for the contention advanced in the present petition that the Circuit Court of Appeals had no *power* to issue the writ of mandamus.

Beyond this, the decision of the Circuit Court of Appeals is in accord with the practical and realistic application of procedural rules called for in the *Adams* case. The record in this case shows—in addition to the considerations above mentioned—that the defendants, corporate and individual, represent a good sized segment of the evaporated milk industry (R. 71). When the indictment was returned in June, 1941, that industry had already been called upon for great increases in production for purposes of lend-lease abroad and preparedness at home; this under the same priorities as were being accorded to shells (R. 71-72). Naturally the burden has greatly increased with our entry into the war, and as this reply is written the papers say that domestic rationing of evaporated milk is at hand. The record shows that many of the forty-four defendants are engaged, not only in their own businesses of production, but also with the War Production Board and other war agencies (R. 72).

If the indictment is invalid this case should end "now" (*Ex parte Simons*, supra)—not after forty-four defendants have been brought from all corners of the country, diverted from production work, and held for a trial of weeks or months in San Francisco. All this will be perfectly futile if the position taken by the present pleas is ultimately sustained. The factual issues determining the validity of the grand jury action, its jurisdiction and that of the trial court, can be determined in a trial of a few hours.

In conclusion we repeat that petitioners do not contend that the record before the Circuit Court of Appeals was insufficient to justify the issuance of a writ of mandamus if the power to issue the writ existed. That the court had

power to issue the writ is, we submit, established by the principles of law and the precepts of common sense declared in *Adams v. United States, ex rel. McCann*, supra, and the other decisions of this Court above cited.

We respectfully submit that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
January 23, 1942.

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